NO. 21856

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HOWARD DWAYNE SPRADLIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF

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Argument (continued)

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STATEMENT OF JURISDICTIONAL FACTS

Under the authority of Title 28, United States Code, Section 1291, and Rule 27 (a), Federal Rules of Criminal Procedure, an appeal was taken to this Honorable Court by Notice of Appeal filed April 3, 1967 (R. 167, 168) from the judgment and sentence of the United States District Court for the District of Nevada, at Las Vegas, Nevada, adjudging the defendant guilty of Interstate Transportation of a Stolen Motor Vehicle, Title 18, United States Code Section 2312, and sentencing the Defendant to serve a term of five years, and from the Court's refusal to grant defendant's motion for a mistrial, motions to dismiss for lack of jurisdiction, and motions for judgment of acquittal, and for error in the giving and refusing to give certain instructions to the jury.

The defendant is presently confined at the Federal Correctional Institution at Lompoc, California, pursuant to the judgment and commitment of the Court (R. 164).

By order of the lower court, this appeal was permitted in forma pauperis (R. 165, 166), and counsel for appellant is continuing to serve under the order of appointment of counsel made by the lower court (R. 13).

STATEMENT OF THE CASE

THE CHARGE

A federal grand jury indictment was returned and filed in the United States District Court for the District of Nevada, at Las Vegas, Nevada, on October 13, 1966, against the defendant HOWARD DWAYNE SPRADLIN, Appellant herein, charging that on or about September 23, 1966, he knowingly transported a stolen automobile in interstate commerce from Flagstaff, Arizona, to Las Vegas, Nevada, in violation of Title 18, United States Code, Section 2312 (R. p.5).

Defendant was arraigned and pleaded Not Guilty on October 31, 1966 (R. p. 18).

ARREST, CUSTODY AND COMMITMENT

The defendant has gone through three trials in the United States District Court for the District of Nevada at Las Vegas, Nevada, under the above-described charge. Because of that fact, and the indigency of the defendant which prevented him from posting a bail bond, or making cash deposit, as of the date of this writing defendant has been continuously in jail and penitentiary custody for a period of time just 50 days short of one year.

Pursuant to warrant of arrest, the defendant was

taken into custody of the United States Marshall on October 20, 1966 (R. p. 19). Bail was fixed at $1,500.00 (R. p. 12) by the United States Commissioner calling for appearance bond with sufficient solvent sureties or cash deposit of $1,500.00 (R. p. 12). Defendant was financially unable to employ counsel and the Court ordered the appointment of the undersigned as the attorney for the defendant (R. p. 13).

Defendant remained continuously in custody of the United States Marshal at the Clark County Jail in Las Vegas, Nevada, until following his conviction after the third trial he was removed to the Federal Correctional Institution at Lompoc, California, on or about June 13, 1967, where he has since been in custody continuously to present date under the judgment and commitment of the lower court (R. p. 164). At the time of sentencing, the Court raised the bond to $2,500.00 pending appeal, which bond defendant could not post because of lack of funds.

BASIC CONTENTIONS OF DEFENDANT

1. The proof was not sufficient to establish the commission of the crime charged, particularly in that the proof did not establish the following:

(a) that the automobile in question was a stolen

automobile;

(b) that the defendant had knowledge the automobile was stolen;

(c) that with such knowledge, the defendant wilfully transported the stolen automobile in interstate commerce.

2. Under the Due Process Clause of the Fifth Amendment to the United States Constitution, and under the particular circumstances of this case, the jury should have been, but were not, plainly instructed that before they could draw any inferences against the defendant by reason of his possession of the automobile in question, they must first determine that the automobile was stolen, and then they might, but were not required to, infer from the defendant's possession of it that he stole it; that only then would they be permitted, but not required, to draw the further inference that the defendant knowingly transported such stolen automobile in interstate commerce.

The instructions given to the jury allowed <u>all</u> of the ultimate facts to be presumed against defendant rather than proved and permitted the defendant to be convicted on a presumption of guilt.

3. The defendant was deprived of a fair trial by reason of prejudicial error in the charge to the jury, which was, taken as a whole, confusing and misleading, and in

addition:

(a) the instruction given by the court dealing with "Judging the Evidence" nullified the instructions given by the court concerning proof beyond a reasonable doubt;

(b) the court's instruction on "inferred" criminal intent allowed the jury to "infer" guilt in a prosecution requiring proof of specific criminal intent;

(c) the instruction defining the elements of the crime was so worded as to convey to the jury an assumption of fact on the part of the Court that the defendant transported the automobile in interstate commerce.

4. The refusal of the trial court to allow defendant to examine a portion of the pre-sentence report and confer with his counsel regarding it, deprived the defendant of the benefit of counsel at the rendition of sentence, in violation of the Sixth Amendment to the United States Constitution.

5. In the disposition of this appeal, the reversal of defendant's conviction on any ground should be accompanied with an order directing the defendant's discharge from custody, because a remand of the case for a new trial, after he has already gone through three trials and remained in custody either in jail or the federal correctional institution every day since his arrest on October 13, 1966, would constitute a denial of his right to a speedy trial, in violation of the

Sixth Amendment to the United States Constitution, and inflict upon him cruel and unusual punishment, in violation of the Eighth Amendment to the United States Constitution.

SUMMARY OF EVIDENCE

William Egan, a resident of Flagstaff, Arizona, owned a 1961 Oldsmobile automobile. (Tr. p. 28, lines 15-16). On September 15, 1966, he requested that an agent of Morris Motors Company in Flagstaff take the car down to the company's lot to appraise the car for trade-in purposes. (Tr. p. 29, lines 13-15).

Mr. McCoy, the general manager of Morris Motors, obtained the car from Mr. Egan's residence on September 15, 1966, and drove it down to Morris Motors (Tr. p. 33, lines 14-18) which was located on United States Highway No. 66, the main street through Flagstaff, in the central business district of the city (Tr. p. 39, lines 15-25 - p. 40, line 1). Mr. McCoy turned the car over to the company's service manager, and after the service manager examined it, the car was parked on the "back lot", a parking area maintained by Morris Motors adjacent to its body shop. One side of the lot bordered on a public alley, and was unenclosed; the opposing side was also unenclosed; one side adjoined a vacant lot across which there was a fence. (Tr. p. 34, lines 2-15). The ignition key was placed inside the car, either over the sun visor or under the seat. (Tr. p. 34, lines 16-19).

On September 26, 1967, when another automobile dealer in Flagstaff telephoned for permission to examine the car, Mr. McCoy discovered it was missing from the lot. (Tr. p. 34, lines 24-25 - p. 34, lines 1-3; p. 34, lines 17-20).

Mr. McCoy did not give anyone permission to use the car (Tr. p. 36, lines 11-14); however, Mr. McCoy did not have exclusive possession and control of the car--during the week beginning September 19, 1966, he was in Los Angeles, California, attending a convention, during which time his duties were performed by Mr. Morris, the automobile dealer and a part owner of the company. (Tr. p. 35, lines 10-16; p. 38, lines 16-21). In the operation of the business it sometimes became necessary to move an automobile from one place to another, in which event the car would be moved by the porters, service manager or mechanics. Such an occasion could have arisen while Mr. McCoy was away from the business without his knowledge, (Tr. p. 40, line 25; p. 39, lines 1-20). In fact, such an occasion could have arisen without his knowledge while Mr. McCoy was at the place of business (Tr. p. 41, lines 11-13). Mr. McCoy didn't know whether or not any of the porters, service manager or mechanics had been required to move the car or use it for any purpose (Tr. p. 42, lines 3-7).

Although Mr. Morris continued to occupy the same position with the company at the time of the Third Trial as he had occupied in September, 1966, as did Mr. Steinspring (Tr. p. 38, lines 7-25; p. 39, line 1), neither they nor any other person from Morris Motors were called to testify on

behalf of the Government.

On September 26, 1966, the defendant was arrested at Las Vegas, Nevada, at about 6:00 o'clock P.M., and charged with an offense against the city of driving an automobile under the influence of alcoholic intoxicants (Tr. p. 53, line 14-24; p. 55, lines 11-15; p. 60, lines 2-6).

The police officer ran a test on the defendant for intoxication and determined that he was incapable of operating a motor vehicle (Tr. p. 59, line 24 - p. 60, line 1). Much of the officer's testimony was concerned with the defendant's operation of the car from the time the officer first began to pursue the car on motorcycle until the time defendant pulled the car onto a side street and stopped (Tr. p. 52-54).

The officer talked to the defendant about five (5) minutes and then went back to his motorcycle to write out a toll slip for the impounding of the car; during which time, the defendant ran away from the scene (Tr. p. 53, lines 21-25, p. 54, lines 1-3; lines 23-25, p. 55, lines 1-15). The defendant was taken into custody again following chase about two blocks away, and the officer said the defendant appeared to be totally exhausted.

The drunken condition of the defendant was the subject of instruction to the jury on the issue of fact as to whether or not the defendant was in possession of the vehicle within the meaning of the law.

As to the evidence tending to show flight by the defendant, the jury was also instructed that the flight must

be referrable to the particular crime charged by the present indictment and the instruction covered the issue whether or not the defendant's intoxication deprived his flight from being an intentional one and whether or not his flight was referrable to the present crime. (Tr. p. 112, line 14 - p. 113, line 14). In this connection the police officer testified he did not verbally accuse or arrest the defendant under the Dyre Act (Tr. p. 60, lines 7-11).

The final witness to testify was an FBI agent who identified the vehicle driven by the defendant and impounded by the Las Vegas City Police as that belonging to William Egan of Flagstaff.

The defendant did not testify and did not offer any witnesses.

While this summation of the evidence has been drawn from the proceedings at the Third Trial, it does not differ substantially from the testimony at the preceding trials.

THE FIRST TRIAL

The First Trial commenced before a jury on December 6, 1966 (R. p. 42). The government called several witnesses; the defendant did not testify and produced no witnesses in his behalf (R. p. 42). At the close of all the evidence, defendant moved for judgment of acquittal, which was denied (R. p. 42). Following arguments of counsel and the charge to the jury the case was submitted and resulted in a mistrial (R. p. 42), by reason of the inability of the jury to reach a verdict (R. p. 42).

MOTION FOR ACQUITTAL AFTER DISCHARGE OF JURY WITHOUT RETURNING VERDICT

On December 14, 1966, defendant filed a renewed Motion for Judgment of Acquittal under Rule 29 of the Federal Rules of Criminal Procedure (R. pp. 44, 55-56) contending the evidence was not such that a reasonable mind might fairly conclude guilt beyond a reasonable doubt, as was argued at the close of all the evidence (R. p. 55) and further contending that under Rule 29, supra, which authorizes the renewal of a motion for judgment of acquittal when the jury has been discharged for inability to arrive at a verdict, where the proof is circumstantial, the trial judge should acquit the

defendant unless defendant's guilt is the only reasonable hypothesis under the evidence, (R. p. 55) although guilt may also be a reasonable hypothesis, which contention was resisted by the government (R. p. 58-60) which maintained the same test applied to the trial court in passing on such motion where a mistrial resulted from a "hung jury," as applied when the motion was considered after the return of a guilty verdict, wherein the trial judge does not pass upon the "credibility of the witnesses or the weight of the evidence," but must view the evidence and the inferences that may be justifiably drawn therefrom in the light most favorable to the Government." (R. p. 60, lines 1-6).

The Motion for Judgment of Acquittal under Rule 29 came on for hearing and was denied on January 3, 1967 (R. p. 65).

THE SECOND TRIAL

The Second Trial commenced before a jury on January 12, 1967. The same witnesses testified for the government as at the First Trial, except for Charles McGlinchey, as already noted. The defendant did not take the stand or offer any evidence in his behalf (R. p. 66). At the close of all the evidence, defendant moved for dismissal on jurisdictional grounds, and also moved for judgment of acquittal, both of

which motions were denied (R. p. 66).

Following arguments and the charge to the jury, the case was submitted; the jury deliberated about two hours and then notified the Court it desired "clarification on the indictment, regarding Title 18, Section 2312, United States Code." (R. p. 78).

Court was re-convened and the foreman of the jury stated the concern of the jury as follows:

> "JURY FOREMAN HESTER: There appears to be a question of, some feel that the jury must find that this man either did or did not transport the vehicle himself knowing that it was stolen. There seems to be others who, by the very fact that he was in possession of an automobile which was stolen, would seem to be the proof that we are looking for, and this is the point that we are in doubt about." (R. p. 117, lines 9-16).

The Court charged the jury, in substance, that it should determine from the evidence whether the motor vehicle was stolen in Arizona, but that they were not required to find that the defendant stole the motor vehicle--just that it was stolen (R. p. 118, lines 17-22); that if the jury from all the evidence found beyond a reasonable doubt that the car was stolen in Arizona, that secondly the jury must find beyond

a reasonable doubt that the defendant was in possession of the car in Nevada, and that if the jury "did find both of these elements, that the automobile was stolen in Arizona and that the defendant was found to be in possession of the automobile here in Nevada, beyond a reasonable doubt, then you may, . . . (ommitting definition of inference) . . . you may then draw the inference, first that the defendant knew that the automobile was a stolen motor vehicle and, second, you may also infer that the defendant transported it in interstate commerce, that is from Arizona to Nevada, or that he caused it to be transported." (R. p. 119, lines 2-13).

Following objections by defendant to the giving of these instructions, the refusal to give other instructions, and the procedure employed by the Court in refusing to allow defendant's counsel opportunity to submit proposed language to the Court for the supplemental charge (Tr. p. 119, beginning line 24, through p. 122), the Court further instructed the jury as follows:

> "THE COURT: Let me cover the matter of this ground again so there is no question in your minds about the law.
>
> "I first said that if you found beyond a reasonable doubt the car was stolen in Arizona, second, if you found beyond a reasonable doubt that

> the defendant was found in possession of the car here in Nevada, that you might make the inference that the defendant knew the car was stolen and also that he transported or caused to be transported--I left out something--you should also find in addition to finding the car was stolen in Arizona and that the defendant was in possession here, you must also find beyond a reasonable doubt that the car was transported *somehow by someone* from Arizona to Nevada." (R. p. 124, lines 1-5, through line 9 on p. 33) (Emphasis supplied)

The jury was excused for further deliberations, after further objections were made to the foregoing charge by defendant (R. p. 126, line 16 through page 127, line 11).

The jury indicated the supplemental instructions had resolved their doubts (Tr. p. 28, line 14), the jurors were excused for further deliberations and returned back into court after an interval of ten minutes with a verdict of guilty (R. pp. 127, 128, and 79).

The defendant, on January 19, 1967, filed a Motion for Judgment of Acquittal, renewing the same motion made at the close of all the evidence (R. p. 80) and a Motion for New Trial grounded upon charged prejudicial error in the instructions given by the Court and the Court's refusal of certain

instructions requested by defendant (R. p. 90). These motions were heard by the Court on February 20, 1967 (R. p. 140) and stood submitted to the Court, which later that same day filed a Minute Order denying the Motion for Judgment of Acquittal and granting the Motion for a New Trial (R. p. 142).

THE THIRD TRIAL

The Third Trial commenced before a jury on March 28, 1967. The Government made virtually the same case it had made at the Second Trial. The defendant did not testify and offered no evidence in his behalf. At the close of all the evidence, the defendant moved the court to dismiss the case for lack of jurisdiction (Tr. p. 62, line 24--p. 69, line 19), which was denied. Defendant next moved for Judgment of Acquittal under Rule 29, which was denied by the Court (Tr. p. 69, line 22--p. 70, line 19).

After the arguments and the charge to the jury, the case was submitted and the jury returned into court after deliberating about an hour and forty minutes, with a guilty verdict (Tr. p. 121, line 21--p. 122, line 22).

The Court discharged the jury and then proceeded immediately with the sentencing of defendant (Tr. p. 123-127; R. p. 151) and filed its final judgment and commitment adjudging the defendant guilty of interstate transportation of

a stolen motor vehicle, in violation of Title 18, Section 2312, United States Code, and committing him to the custody of the Attorney General for imprisonment for a period of five years, to become eligible for parole pursuant to Title 18, Section 4208(a), United States Code, at such times as the Board of Parole may determine. (R. p. 164).

MOTION FOR MISTRIAL

In the Opening Statement for the Government, counsel made the following statement to the jury:

> "Now, I would like to emphasize that the indictment here does not allege that the defendant personally stole the car, and that is not involved in the crime before you. The only crime with which we are concerned is whether or not this defendant transported the car knowing it to be stolen--
> (Interrupted by objection of defense counsel)"
> (Tr. pp. 19-20)

The ground of objection was that counsel, contrary to law, had informed the jury the issue of whether or not defendant stole the car was not involved in the crime charged. As will be brought out in the Argument herein, if the bare circumstance of possession of automobile in a foreign state is sufficient to support an inference of interstate transportation

by the possessor, that inference depends upon and must arise out of and with an inference that the possessor stole the automobile; especially where there is no proof as to the theft or interstate transportation aside from the fact of unauthorized possession.

The issue of theft of the car, and the proof which would be made by the Government, as well as the contentions to be made by defendant on this point, were matters of record made long since, and many times over, in the earlier trials. and were well known to Court and counsel. The court refused defense counsel an opportunity to phrase specific objection to this statement and relegated counsel to the recourse of making her own opening statement (Tr. p. 20, lines 4-14), although obviously this invited counsel to argue a legal dispute to the jury. Therefore, counsel moved for a mistrial (Tr. p. 20, lines 15-24, which the Court denied and in so doing, approved and further emphasized the error, by saying of the statement objected to: "That is the law. . ." (Tr. p. 20, line 25).

This error, under the circumstances of this case, was highly prejudicial to defendant, was not mitigated by the evidence adduced by the government, nor cured by the Court's charge to the jury, which charge is considered at a later point herein.

MOTION FOR DISMISSAL

At the conclusion of the Government's case the defendant moved for dismissal of the case, urging, in substance, the following: (1) The proof did not establish that the automobile had been stolen by anybody; (2) The proof did not establish interstate transportation of the vehicle by the defendant, or that the automobile was still a part of interstate transportation when defendant was observed driving it; (3) The circumstance of unexplained possession of recently stolen property may, together with other circumstances proved (and not so proved or present in this case), may give rise to an inference that the possessor stole the property; but it cannot give rise to an inference that the possessor transported the property in interstate commerce unless the jury finds from the evidence beyond a reasonable doubt that the property was stolen and the possessor stole it; then, the jury may draw an inference that the possessor transported the property in interstate commerce; (4) That the circumstance of unexplained possession alone, in the absence of other criminating evidence, or, in effect, that proof of possession, which is not an element of the crime of interstate transportation of a stolen automobile, cannot be made to constitute proof of all of the elements of the crime, even though that possession stand

unexplained; and (5) That all reported Dyre Act prosecutions in modern years involved proof of directly criminating matters and circumstances, in addition to bare, unexplained possession; and (6) That the defendant could not be <u>required</u> to explain his possession or prove any part of the Government's case. (Tr. pp. 63-69)*

This motion was summarily denied by the Court, which stated no response was needed from the Government to the motion. (Tr. p. 69, lines 17-19).

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*ERRATA: Tr. p. 66, line 22: "Wallenbarg" should be "Bollenbach,"
Tr. p. 67, line 2: "Wallenbarg" should be "Bollenbach."
Tr. p. 68, line 9: "Traverse" should be "Travers."
Tr. p. 68, line 11: "Mirandie" should be "Morandy."
Tr. p. 68, line 12: "175 Federal Second" should be "170 F. 2d 5."

MOTION FOR ACQUITTAL

The defendant moved the Court for judgment of acquittal at the close of the Government's evidence, which was denied (Tr. p. 70, lines 3-19).

The defendant rested without offering any evidence, and formally renewed his motion for judgment of acquittal, which was again denied (Tr. p. 76, lines 2-8).

CHARGE TO JURY

The Statement of Specific Errors in the court's charge to the jury is deferred to those portions of the Specification of Errors and Argument dealing with the instructions. However, it should be noted here that defendant's counsel did not make a record of objection at the Third Trial to the court's giving of the following instruction:

> "As a general rule, it is reasonable to infer that a person ordinarily intends all of the natural and probable consequences of acts knowingly done or knowingly omitted, so unless the evidence in this case leads the jury to draw a different or contrary conclusion, the jury may draw the inference and find that the accused intended all of the natural and probable consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from the acts knowingly done or knowingly omitted by the accused."

(Tr. p. 106, lines 20-25 - p. 107, lines 1-4).

The defendant contends that the error in giving this charge in this case, which required proof of specific intent and in which the ultimate facts required for conviction were not proven facts but "referred" or "presumed" facts, constituted plain error under Rule 52 (b), Federal Rules of Civil Procedure, 18 U.S.C. The failure to make objection, however, was attributable to the procedures followed by the court in the settling of instructions and in making the charge to the jury and not intentional on the part of defendant or his counsel as shown hereafter.

In making the record of objections at the Second Trial, the same identical instruction was given (R. p. 100, lines 10-17) over the following objection of the defendant:

> "We object to the giving of the Court's instruction on general intent for the reason that this instruction includes a presumption that every person intends the consequences of their acts, for the reason that this is a case which does require specific intent, it requires that the acts be knowingly and willfully done under the statutory definitions of a crime, and we think that the jury may probably be confused as to the issue of specific intent." (R. p. 112, lines 13-21).

The procedures on settling instructions are reported beginning at Tr. p. 70, beginning at line 20 and continuing through line 6 on p. 75. The government did not request any

instructions. The court drew its instructions from Mathes & Devitt, Federal Jury Practice and Instructions, except those portions of defendant's proposed instructions accepted by the court. Thus, the court announced section numbers from the foregoing book in this fashion, for example: "I am going to give 7.01, 7.03, 8.01, 8.02, 8.03, 8.04" (Tr. p. 21, lines 2-3). The court did not hear complete objections of counsel at this time (Tr. p. 72, lines 21-23) but allowed counsel to make objections at the bench following the giving of instructions to the jury (Tr. p. 75, lines 2-6).

Following the charge to the jury, respective counsel and the court reporter approached the bench where objections were received by the court in the presence but out of the hearing of the jury, which sat some ten (10) to twelve (12) feet away. This procedure, in which counsel has never been provided with a typed transcript of the court's charge and in which the record of objections is made in a closed huddle before the bench with the reporter struggling to hear and record the proceedings on his stenotype device while the jurors wait a short distance away, is not a procedure which lends itself to either order or clarity. It is small wonder that in the giving of the charge counsel may sometimes "lose his place" so to speak in the book of Mathes & Devitt.

THE SENTENCING

The jury returned into Court with its verdict at 4:45 o'clock P.M. on the day of the Third Trial (R. p. 150) The verdict was filed, and the Jury was excused (Tr. p. 122, lines 20-25), with the announcement made by the court, before the jurors left the room: "The Court will remain in session." (Tr. p. 123, line 1).

Immediately after the jury had cleared the courtroom, the Court announced that on January 30, 1967, the Probation Officer submitted a pre-sentence report to the Court and that the Court was going to sentence the defendant (Tr. p. 123, lines 3-6). Defense counsel informed the Court that she had not had an opportunity to examine the report, although she had earlier been notified the report was available, but since sentence was not to be imposed at that time, she did not examine it. That on the day she did attempt to contact the Probation Officer, the office was closed for a federal holiday (Tr. 123, lines 6-15).

The Court thereupon remanded the defendant to custody and ordered a ten minute recess for defendant's attorney to examine the report. (Tr. 123, lines 16-19) Court recessed at 4:50 o'clock P.M. and reconvened at 5:00 o'clock P.M. (R. p. 151).

When Court reconvened defense counsel and defendant were asked to stand at the podium, whereupon defense counsel informed the Court she wanted to make a request of the Court

before imposition of sentence. After informing counsel she would have time to be heard, the Court immediately commenced the sentencing procedure and then allowed defense counsel to make a statement "in mitigation of punishment," with the direction: "Now, Mrs. Quintana." (Tr. p. 124, lines 1-13).

In compliance with the court's mandate, defense counsel made a brief statement directed to mitigation of punishment and then requested that the defendant be allowed to examine a portion of the pre-sentence report:

> "MRS. QUINTANA: . . .
>
> The request which I had to make of the Court is that some of the matters which are mentioned in the list of offenses on the record of the defendant are not known to me to have been committed by him or not to have been committed by him. This covers approximately two pages, I believe, in the report, and I request permission of the Court that defendant be allowed to examine that list to see if there is anything that he wishes to say with regard to any of those matters.
>
> "THE COURT: No. That request will be denied."
>
> (Tr. p. 125, lines 2-10)

Sentence was imposed after a further brief colloquy between the Court and defense counsel on mitigation of punishment. (Tr. p. 126, lines9-20).

Attached to this Brief, as appendices "A" and "B"

appear, respectively, the notification defense counsel received from the probation officer in advance of the sentencing scheduled after the Second Trial, (which of course was vacated in the face of the new trial ordered by the Court) and the Affidavit of defense counsel showing that if there was any lack of diligence on her part in not earlier examining the report, it was not more than excusable neglect; and that by remanding the defendant to custody during the ten-minute allowed counsel to examine the report, the defendant was removed from the courtroom and placed in a barred, locked cell across the hall in the U. S. Marshall's office, until Court reconvened, and that defendant's counsel had no opportunity whatever to discuss the report with the defendant with regard to what might be said or done in his behalf concerning the highly prejudicial record of prior offenses.

Defense counsel did not realize and therefore did not alert the Court to the crucial prejudicial effect of the sentencing procedure under the above circumstances; nevertheless <u>that effect was to deprive the defendant of the benefit of counsel at his sentencing</u>, which is urged herein as a constitutional defect vitiating the conviction and judgment and sentence.

SPECIFICATION OF ERRORS

1. The Court erred in denying defendant's Motion for Judgment of Acquittal made at the close of all the evidence in the First Trial, and renewed after the discharge of the jury without returning a verdict.

2. The Court erred in denying defendant's Motion for Judgment of Acquittal made at the conclusion of all the evidence and renewed after the jury's verdict in the Second Trial.

3. The Court erred in refusing to declare a mistrial on defendant's motion therefor at the Third Trial by reason of the erroneous statement of law made by government counsel in opening argument.

4. The Court erred in denying defendant's Motion for Dismissal of the case made at the conclusion of the government's case in the Third Trial.

5. The Court erred in denying the defendant's Motion for Judgment of Acquittal made at the close of the government's evidence in the Third Trial, and renewed at the close of all the evidence.

6. The trial Court erred in giving the following instruction to the jury at the Third Trial:

> "As a general rule, it is reasonable to infer

> that a person ordinarily intends all of the natural and probable consequences of acts knowingly done or knowingly omitted, so unless the evidence in this case leads the jury to draw a different or contrary conclusion, the jury may draw the inference and find that the accused intended all of the natural and probable consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from the acts knowingly done or knowingly omitted by the accused." (Tr. p. 106, beginning at line 10, through line 4 on p. 107).

Due to the circumstances set forth under that portion of the Statement of the Case designated The Charge to the Jury, defense counsel inadvertently failed to make a record of objection to this portion of the charge.

Nevertheless, the same charge had been given at the Second Trial, (R. p. 100, lines 10-17), over the following objection of defendant:

> "We object to the giving of the Court's instruction on general intent for the reason that this instruction includes a presumption that every person intends the consequences of their acts, for the reason that this is a case which does require

> specific intent, it requires that the acts be knowingly and wilfully done under the statutory definitions of a crime, and we think that the jury may probably be confused as to the issue of specific intent." (R. p. 112, lines 13-21).

Moreover, the giving of the objectionable instruction, considered in the context of the other instructions given and the issues raised under the circumstances of this case, constituted plain error within the meaning of Rule 52(b), Federal Rules of Civil Procedure, 18 U.S.C.

7. The trial Court erred in giving the following instruction to the jury, set forth in context, with the erroneous portion underscored:

> "There are three essential elements that the Government is required to prove in order to establish the offense charged in the indictment. Each of these elements must be proved beyond a reasonable doubt. The first element, that the motor vehicle was stolen. If you don't find in this case that the motor vehicle was stolen, or if you have a reasonable doubt that the motor vehicle was stolen, you should stop right there and you must acquit the defendant. So this is the first element, if the motor vehicle was stolen.

7. The trial court erred in giving the following instruction to the jury, set forth in context, with the erroneous portion underscored:

> "There are three essential elements that the Government is required to prove in order to establish the offense charged in the indictment. Each of these elements must be proved beyond a reasonable doubt. The first element, that the motor vehicle was stolen. If you don't find in this case that the motor vehicle was stolen, or if you have a reasonable doubt that the motor vehicle was stolen, you should stop right there and you must acquit the defendant. So this is the first element, if the motor vehicle was stolen.
>
> "The second element, <u>did the defendant transport the automobile in interstate commerce</u>.
>
> "Third, <u>that when so transported the defendant knew that the motor vehicle had been stolen.</u>
>
> "<u>The offense is complete when the three elements just stated have been established by the evidence in the case beyond a reasonable doubt.</u> <u>The proof need not show who may have stolen the motor vehicle.</u>"
>
> (Tr. p. 108, beginning at line 11, through line 3 of p. 109).

The defendant requested that the Court give Defendant's Proposed Instruction No. A, as follows:

> "Three essential elements are required to be proved in order to establish the offense charged in the indictment:
>
> "First: That the motor vehicle was stolen;
>
> "Second: That the defendant transported the automobile in interstate commerce; and
>
> "Third: That when so transported the defendant knew the motor vehicle had been stolen.
>
> "The burden is always upon the Government to prove beyond a reasonable doubt every essential element of the crime charged." (R. p. 154)

The defendant's proposed instructions Nos. B and C are also pertinent to this specification of error, but are set forth under Specification of Error No. 8 immediately following, and are incorporated herein by reference to avoid repetition.

When the Court announced its intention with regard to this instruction, the following occurred:

> "THE COURT . . .
>
> "Now, then, I will give in lieu of 32.05, defense counsel wishes it, defendant's proposed "A" which restates the elements. I am going to add, --in other words you make three elements out of it instead of two, but I am going to add from 32.05 /The court's reference here is to Section 32.05, Mathes & Devitt, Federal Jury Practice and Instructions, p. 271.7 this sentence, 'the offense is completed when the three elements just stated are established by the evidence

in the case and proof need not show who may have stolen the motor vehicle.'

"Now, do you want me to give--I am giving you a choice of--

"MRS. QUINTANA: Yes. I would like to have you give defendant's "A", but I would like the record to show that we do not request that the court give the additional language quoted and will have to object to that.

"THE COURT: Well, if I give your [s], I include the additional language. Now, if you want me to give 23, 32.05 as it reads or your instruction as I have amended it, that is the only choice I am giving you. Which one do you want?

"MRS. QUINTANA: Your Honor, we have requested defendant's instruction number "A", and we stand on that.

"THE COURT: All right.

"MRS. QUINTANA: Then you will be giving 32.05?

"THE COURT: Then I will give 13.07, 12, . . . "

(Tr. p. 73, lines 1 through 25).

Later on, the Court expressly ruled it would give Defendant's Proposed Instruction No. A, with the addition of the last sentence hereinabove discussed (Tr. p. 74, lines 11-24).

Although the above colloquy does not contain the specific ground of objection to the sentence "added" by the

Court, it had been argued over and over again by defendant that unless there was independent proof the automobile was stolen by somebody, before the jury could permissibly infer the defendant transported the automobile in interstate commerce with knowledge it was stolen, the jury would have to determine from all the evidence, beyond a reasonable doubt, that the defendant stole the automobile. See, for example, the discussion between Court and counsel regarding the giving by the Court of Defendant's Proposed Instruction C, described under Specification of Error No. 8 (Tr. p. 120, line 19 through p. 121, line 9).

The instruction considered under this Specification of Error is further objectionable in that the phrasing of the second element of the crime in the form of a question, followed by the phrasing of the third element of the crime as an affirmative statement, that is,

> ". . . So this is the first element, if the motor vehicle was stolen.
>
> "The second element, did the defendant transport the automobile in interstate commerce.
>
> "Third, that when so transported the defendant knew that the motor vehicle had been stolen . . ."
>
> (Tr. p. 108, lines 19-25)

necessarily expressed to the jury a determination of fact made by the court, that the defendant transported the automobile in interstate commerce.

The defendant's attorney, relying on the announced decision of the Court that when it defined the elements of the crime it would use Defendant's Proposed Instruction No. A, heard what she expected to hear, instead of what was said, and was not aware of the crucial and prejudicially erroneous departure made by the Court from the language of Defendant's Proposed Instruction No. A, and therefore did not interpose an objection at the conclusion of the charge before the case was submitted to the jury.

Nevertheless, since the language of the instruction was not made known to counsel at the time of the "settling" of the instructions, and since Defendant's Proposed Instruction No. A. properly defined the elements of the crime, defendant is properly entitled to assign the same as error without resort to the Rule of Plain Error (Rule 52 (b), Federal Rules of Criminal Procedure, 18 U.S.C.), but if the Court deem otherwise, then defendant urges this Specification of Error under said Rule and Doctrine.

8. The trial court erred in refusing to give the charge set forth in Defendant's Proposed Instruction No. B (R. p. 155) and in giving in lieu thereof the instructions commencing at page 109, line 17, of the Trnascript of Trial Proceedings, and continuing down through Tr. p. 111, line 14.

The instruction given by the Court was drawn from §10.10, Mathes & Devitt, Federal Jury Practice and Instructions, pp. 131-132, and reads as follows, in objectionable part:

"Possession of property recently stolen, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find, in the light of surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen.

"Possession in one state of property recently stolen in another state, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find, in the light of surrounding circumstances shown by the evidence in the case, that the person in possession not only knew it to be stolen property, but also transported it or caused it to be transported in interstate commerce.

- * (Omitting paragraph dealing with the term 'recently' and informing the jury the longer the period of time since theft, the more doubtful the inference which may be drawn.)

"If you should find beyond a reasonable doubt from the evidence in the case that the motor vehicle described in the indictment was stolen, and was transported in interstate commerce as charged, and that, while recently stolen, the property was in the possession of the accused in another state than that which it was stolen, the jury would ordinarily be

justified in drawing from those facts the inference that the motor vehicle was transported, or caused to be transported, in interstate commerce by the accused, with knowledge that it was stolen, unless possession of the recently-stolen property by the accused in such other state is explained to the satisfaction of the jury by other facts and circumstances in the case.

"In considering whether possession of recently stolen property has been satisfactorily explained, the jury will bear in mind that in the exercise of Constitutional Right the accused need not take the witness stand and testify. Possession may be satisfactorily explained through other circumstances, other evidence independent of any testimony of the accused.

"It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in the case warrant any inference which the law permits the jury to draw from possession of recently-stolen property. If any possession the accused may have had of recently-stolen property is consistent with innocence, the jury should acquit the accused." (Tr. p. 109, line 17--p. 111, line 14)

The foregoing instruction was objected to in the following language:

"I object to the giving of the Court's instruction on <u>Section 10.10 from Mathes and Devitt</u> in that it is

> confusing, that it does not specify to the jury what facts must be established before any inferences may be drawn and the order in which dual inferences may permissibly be drawn." (Tr. p. 119, lines 8-13).

The defendant also objected to the refusal of the Court to charge the language of Defendant's Proposed Instruction No. B, for the reason that "it more accurately and with less confusion states the law as applied to the facts of this case." (Tr. p. 119, lines 6-7).

Omitting that portion of the proposed instruction defining an "inference," and distinguishing a "presumption" from an "inference," the proposed instruction states:

> "The unexplained possession of recently stolen property is a fact which, if established by the evidence, will support an inference that the possessor is guilty of the theft.
>
> * * *
>
> "Therefore, if it is proved beyond a reasonable doubt that the defendant was in possession of a recently stolen automobile, you may draw the inference, in the light of all the other evidence, if such possession is unexplained and is inconsistent with the defendant's innocence, that the defendant stole the automobile, but you are not required to draw this inference." (R. p. 155).

It should be explained that defendant's objections regarding the charge given and the charge refused were

affected by the fact the Court ruled that it would give, and did give, Defendant's Proposed Instruction No. C. (Tr. p. 112, lines 5-13), which reads as follows:

> "If you draw an inference that the defendant is guilty of stealing the automobile on the basis of proof of the facts that he was found in possession of an automobile recently stolen in another state, which possession is unexplained and in the light of all the other evidence is inconsistent with the defendant's innocence, then you are permitted, but not required, to draw a further inference that the defendant transported the automobile in interstate commerce, with knowledge of its stolen character."

It was later brought out that the giving of the foregoing instruction resulted from mistake or inadvertence on the part of the Court:

> "THE COURT: I gave your "C" and I don't think I read it carefully. Going back, now, you start, 'If you draw an inference that the defendant is guilty of stealing the automobile,' that issue is the very thing we have been concerned with through these trials.
> MRS. QUINTANA: I thought that is why you gave it.
> THE COURT: No. But I have given now. I was going to give it primarily because it emphasized the fact that they may draw an inference, but not required to. But I thought it read something to this effect, if you find that an automobile has been stolen, and draw

that, and then go on to infer the other things. But it is too late. It is prejudicial to the Government to give it. But it shouldn't have been given, in fairness to the Government. It is certainly not prejudicial to the defendant's benefit." (Tr. p. 120, line 19--p. 121, line 9).

9. The trial court erred in giving the instruction appearing on page 116 of the Trial Transcript between lines 2 and 10, as follows:

> "There is nothing peculiarly different in the way a jury should consider the evidence in a criminal case, from that in which all reasonable persons treat any question depending upon evidence presented to them. You are expected to use your good sense; consider the evidence in the case for only those purposes for which it has been admitted, and give it a reasonable and fair construction, in the light of your common knowledge of the natural tendencies and inclinations of human beings.
>
> "If the accused be proved guilty, say so. If not proved guilty, say so.
>
> "Keep constantly in mind that it would be a violation of your sworn duty to base a verdict upon anything but the evidence in the case.
>
> "Remember also that the question before you can never be: Will the Government win or lose the case? The Government always wins when Justice is done,

regardless of whether the verdict be guilty or not guilty."

The defendant objected to the giving of this instruc- at Tr. p. 120, lines 5-16, as follows:

> "It applies to the proof in this case, not the standard which is required in all criminal cases, but simply the standard that applies in civil cases, that this is manifestly erroneous and is uniquely prejudicial to the defendant in this case for the reason that the proof is circumstantial, and, more so than in the case of direct evidence, the jury is required to abide by the universal requirement that proof be established beyond a reasonable doubt and that a reasonable doubt is such a doubt as would prevent the person from proceeding in respect of the serious /affiars/ of his own existence, and they are not entitled to apply the civil standard in their consideration of the evidence."

10. The trial court erred in refusing the request that defendant be allowed to examine the portion of the presentence report containing the list of offenses purportedly committed by defendant and allowing him to determine, with his counsel, what might be done or said regarding them, thereby abusing his judicial discretion and denying the benefit of counsel to defendant at the time of sentencing.

ARGUMENT

SUMMARY

The government's case was not sufficient to establish the violation of Section 2312, Title 18, United States Code, and was not sufficient to prove the defendant guilty of violating the same.

Where the sole criminating circumstance established in the case is that the defendant was apprehended in a state of alcoholic intoxication driving an automobile owned by the citizen of a neighboring state, and arrested on a charge of driving while under the influence of intoxicants, this circumstance is not sufficient evidence, even with any lawful inferences flowing therefrom, to establish that the car was stolen, that the defendant stole it, and that having stolen it in Arizona, he must have driven it to Nevada in interstate commerce with knowledge that it was stolen, with wilfull and felonious intent.

The defendant should have had judgment of acquittal when he applied for it at the close of the government's case in the First Trial. Instead, after going through two more trials he stands convicted on the same insufficient evidence, and in another month and a half will have served a year in federal custody in the county jail and federal correctional

institution.

The defendant's minor premise is, if he be incorrect in considering himself entitled to dismissal or acquittal, that numerous prejudicial errors in the Court's charge to the jury, and the deprivation of counsel resulting from the manner in which the Court conducted the procedure at the sentencing of the defendant, are cause for the reversal of his conviction, and that a remand of this case for another trial would be cruel and unusual punishment, proscribed by the Eighth Amendment to the Constitution of the United States.

POINT ONE: A CONVICTION WHICH RESTS UPON A PRESUMPTION OF FACT IS CONSTITUTIONALLY INFIRM WHEN THE SUBSIDIARY FACTS AND CIRCUMSTANCES REQUIRED TO SUPPORT THE PRESUMPTION OF FACT, ARE NOT FAIRLY ESTABLISHED BY THE EVIDENCE.

The evidence in this case has been summarized under the Statement of the Case, beginning at page 40.

The instructions given to the jury on the inferences they might draw from the defendant's possession of recently stolen property are set forth under Specification of Error No. 8 and appear at Tr. p. 109, line 17 - p. 111, line 14; Tr. p. 112, lines 5-13.

The test of the sufficiency of the evidence to support a conviction, is whether reasonable minds could find that the evidence exludes every reasonable hypothesis but that of guilt. THOMAS v. U.S., CA 9th, 1966, 369 F. 2d 373.

Where the evidence is circumstantial, the question of its sufficiency is whether the total evidence, including reasonable inferences, when put together, is sufficient to warrant a jury to conclude that defendant is guilty beyond a reasonable doubt. DE VORE v. UNITED STATES, CA 9th, 1966, 368 F.2d 396.

The acceptability of an inference drawn depends upon whether it has been founded upon fact, regardless of whether such fact has been arrived at by direct or circumstantial evidence. TOLIVER v. UNITED STATES, CA 9th, 1955, 224 F2d 742.

If an inference from a fact or set of facts must be overcome with opposing evidence, then the inference becomes a presumption and places a burden on the accused to overcome that presumption. MANN v. UNITED STATES, CA 5th, 1963, 819 F2d 404.

The foregoing ruling was made with respect to this instruction to the jury in a prosecution for income tax evasion:

> "It is reasonable to infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all of the consequences which one standing in like circumstances and possession like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused."

The Court noted other tax evasion cases, including BLOCK v. UNITED STATES, CA 9th, 1963, 221 F2d 786, in which convictions had been reversed for error the charge because it, in effect, told the jury it could draw the conclusion the defendant intended to defeat the payment of the tax from the mere fact that an incorrect return was filed, and thereby shifted the burden of proof from the government to the defendant. It then said of the above charge:

> "The instructions in the instant case go beyond the bounds of the charge set out in the

> above cited cases. If the charge had ended when the jury was told that a person is presumed to intend the natural consequences of his own acts, when considered in the light of the charge as a whole, there would have been no error. When the words 'so unless the contrary appears from the evidence' were introduced, the burden of proof was thereupon shifted from the prosecution to the defendant to prove lack of intent. If an inference from a fact or set of facts must be overcome with opposing evidence, then the inference becomes a presumption and places a burden on the accused to overcome that presumption. Such a burden is especially harmful when a person is required to overcome a presumption as to anything subjective, such as intent or wilfulness, and a barrier almost impossible to hurdle results."

The courts, as well as state and federal legislative bodies, are limited in the manner and degree to which they can provide proof of certain facts constitutes presumptive evidence of the ultimate facts on which guilt is predicated. In the case ot TOT v. UNITED STATES, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943), the court declared:

> ". . . Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the facts proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of the lack

> lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts."

The Court rejected the argument that the defendant has the better means of information is sufficient ground to support the presumption, saying:

> "Nor can the fact that the defendant has the better means of information, standing alone, justify the creation of such a presumption. In every criminal case the defendant has at least an equal familiarity with the facts and in most a greater familiarity with them than the prosecution. It might, therefore, be argued that to place upon all defendants in criminal cases the burden of going forward with the evidence would be proper. But the argument proves too much. If it were sound, the legislature might validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt. This is not permissible.

> "Whether the statute in question be treated as expressing the normal balance of probability, or as laying down a rule of comparative convenience in the production of evidence, it leaves the jury free to act on the presumption alone once the specified facts are proved, unless the defendant comes forward with opposing evidence. And this we think enough to vitiate the statutory provision."

The Due Process Clause of the Fifth Amendment to the United States Constitution operates alike upon presumptions of ultimate fact which are judicially declared and applied, as upon those which are established by the Congress. COLON-ROSICH v. PEOPLE OF PUERTO RICO, CA 1st, 1958, 256 F2d 393.

By the same principle, if the facts proved in a particular case do not afford sufficient base for the application of such a presumption of fact, then, if the jury has been allowed to predicate guilt on presumed ultimate facts, its verdict of guilty contravenes the presumption of the defendant's innocence, the burden of the government to establish the corpus delicti, and the right of the defendant to be confronted by the witnesses against him, in violation of the Due Process Clause, and when the evidence is not sufficient on which to base the presumption of facts or to establish the defendant's guilt independent of any presumption, the verdict is without substantial evidence to support it.

A recent decision of this Honorable Court is highly instructive of the correctness of the foregoing paragraph.

In the case of ERWING v. UNITED STATES, CA 9th, 1963, 323 F.2d 674, the defendant was prosecuted for receiving, concealing, transporting and facilitating the transportation and concealment of cocaine, knowing the same to have been unlawfully imported in the United States. The proof was that the defendant possessed a quantity of cocaine hydrochloride. It was not disputed that such substance constituted a narcotic drug under the provisions of the Statute. However, the proof was that cocaine hydrochloride is a manufactured product, legally manufactured in the United States by several pharmaceutical manufacturers, and is a drug dispensed in drugstores, hospitals and clinics all over the United States for medicinal purposes. The government did not prove that any cocaine hydrochloride was imported into the United States, legally or illegally, or that cocaine hydrochloride was illegally manufactured in the United States from coca leaves, legally or illegally imported. Therefore, there was no rational connection between the unexplained possession of the cocaine hydrochloride and the fact that such narcotic drug was illegally imported to the knowledge of the defendant. Since the defendant did not possess true contraband, i.e., coca leaves, and since the federal statute did not purport to penalize possession of narcotic drugs, the defendant's conviction on the basis of the statutory presumption from unexplained possession was reversed with instructions for dismissal of the indictment, the Court saying:

> ". . . To do otherwise would be to disregard

> appellant's constitutional right to due process and extend the jurisdiction of the Federal Courts beyond constitutional limits."

Thus, even though the substance the defendant possessed in <u>ERWING</u> constituted a narcotic drug within the meaning of the federal statute, and even though the presumption created by that statute provided that "Whenever . . . the defendant is shown to have or have had possession of the narcotic drug such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury," (21 U.S.C. § 174), the evidence was not sufficient to warrant application of the statutory presumption, or its use in support of the conviction.

The authority of <u>ERWING</u> and the cases cited hereinabove, direct that before it may lawfully be presumed that the defendant wilfully transported a stolen automobile in interstate commerce with knowledge it was a stolen automobile upon proof that he was in recent possession of the stolen property in a state other than that of its ownership, the government must certainly prove the automobile was <u>stolen</u>.

In the instant case, the circumstantial evidence is not sufficient to establish the automobile was stolen. It was last known to be on the automobile lot at Morris Motors on September 16, 1967. It was discovered missing from the lot on September 26, 1967. Only one employee or agent of the motor company testified, and he admitted that the car, in the usual cause of business, could have been legitimately moved or used

by porters, the service manager or the mechanics, without his knowledge, both while he was in California during the week beginning September 19, 1967, and also during the time when he was present attending to his duties. The testimony of this witness that he personally did not authorize anybody to move or use the car, did not establish that someone else in authority in the company had not authorized the movement of the vehicle--either Mr. Morris, the automobile dealer who performed the manager's duties while the manager attended the convention in Los Angeles, or another employee who found legitimate occasion to move or use the car. There is no evidence showing when or under what circumstances the car was removed from the motor company lot. The defendant, along with thousands of other people, was in the city of Flagstaff, Arizona, on September 22, 1966, but his whereabouts from that point on until September 26, 1966, are unknown.

There was no evidence connecting or tending to connect the defendant with the car while defendant was in Arizona; there was no evidence connecting or tending to connect the defendant with the immediate premises or neighborhood of the motor car company, or any of its employees. After a completely normal motel tenancy extending from September 9 to September 22, 1966, at Flagstaff, the defendant paid his bill. The motel registration reflected the defendant or the other person occupying the room with him had with them a 1956 Cadillac, black and white. True, the lessee-manager of the motel did not see either of them in possession of this car, but he

didn't see them register-in at the motel either.

When the defendant was arrested for driving the automobile while intoxicated, he parked the car at the street curb, got out of it, and there is not one iota of evidence that he claimed to own the vehicle and withhold its possession from the owner, or that he had performed any acts to conceal the identity of the vehicle, such as altering the license plates, etc.

The evidence relied on by the government to establish possession and flight is equivocal. The defendant's drunkenness was uncontroverted. The officer stated the defendant was "incapable" of driving an automobile. If he was capable of knowing possession, and if he was capable of voluntary flight, such flight is directly referable to the charge on which he was being arrested, not that contained in the present indictment.

It should also be borne in mind that the car was returned to Flagstaff by an agent of Morris Motors Company; and that the owner, Mr. Egan, received the full value of it as credit on a trade-in when he bought another car from a company other than Morris Motors.

A stolen automobile, as the court instructed the jury (Tr. p. 108, lines 3-10) is one which is acquired, or is thereafter possessed as the result of some wrongful or dishonest act, whereby another person either wilfully obtains, or thereafter wilfully retains, its possession, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership.

The circumstances in this case are not sufficient to establish that the car was stolen by anybody, or that it was stolen by the defendant--Indeed, by its insistence that it was under no obligation to prove who stole the car, the Government has tacitly admitted its evidence was not sufficient to prove the defendant stole it.

While the circumstances may be sufficient to give rise to a suspicion that the car was stolen, criminal liability cannot rest on suspicion and conjecture.

This case is comparable to the cases of VIRGIN ISLANDS v. TORRES, D.C., V.I., (1958) 161 F.Supp. 699; BENTON v. UNITED STATES, D.C. App. (1956), 232 F2d 341; and SERIO v. UNITED STATES, C.A.D.C. (1967), 377 F2d 936.

In the VIRGIN ISLANDS case a statute provided that any person charged with having possession of or conveying in any manner anything which may be reasonably suspected of being stolen or unlawfully obtained who could not account to the satisfaction of the court how he came by the same, should be fined or imprisoned. In holding this statute contravened the Due Process Clause, which in a criminal case includes the presumption the accused is innocent until he has been proved to be guilty beyond a reasonable doubt, the court said:

> ". . . The statute here involved puts upon the accused the burden of satisfying the court that his possession or transportation of an article which is merely suspected of having been stolen or unlawfully obtained was not in fact unlawful.

> All that the statute requires the Government to prove is that the accused was in possession of the article or that he transported it in any manner and that it is reasonable to suspect that it was stolen or unlawfully obtained by him. The burden is not placed upon the Government to prove facts from which the inference of guilty knowledge by the accused may be drawn. On the contrary, the statute clearly authorizes the court to draw that inference and find the accused guilty on the basis of the mere suspicion that the article has been stolen or unlawfully obtained.
>
> * * *
>
> ". . . It hardly needs saying that to permit an accused to be found guilty upon an inference drawn from a mere suspicion coupled with a fact which is innocent in itself is to relieve the prosecution of its burden of proof. It is not within the province of a legislature thus to declare an individual presumptively guilty of a crime . . . "

In BENTON, the court had under consideration a statute prohibiting any person having in his possession any instrument, tool, or other implement for picking locks or pockets, or that is usually employed, or reasonably may be employed in the commission of any crime, if he is unable satisfactorily to account for the possession of the implement. The court said appellant was correct in his contention that criminal intent is an essential element of the crime, and that the statute,

by obligating the defendant to show the implements were not in his possession for a criminal purpose cast upon the defendant the burden of proving the absence of criminal intent, which the statute presumed from the mere fact of possession of the articles. The court held, under the ruleof TOT v. UNITED STATES, supra, and MORRISON v. CALIFORNIA, 1934, 291 U.S. 82, 54 S.Ct. 281, 78 L.Ed. 664, that the statute was unconstitutional.

In SERIO, the defendant was convicted of falsely altering postal money orders. Venue was laid in the District of Columbia, where a co-defendant had uttered the money orders. There was evidence connecting the defendant with the postal money orders in Maryland, but no evidence of his presence in or connection with the money orders in the District of Columbia. The Government contended there was a judicial presumption or at lease an inference that the alteration was done at the place of utterance. The court held since the circumstances in the case pointed to the altering having been done in Maryland there was no room for the presumption unless defendant possessed the orders in the District. The Court referred to the requirements for the validity of an evidentiary presumption as set forth in TOT v. UNITED STATES, supra, and ruled:

> " . . . No less is essential for a valid presumption of fact initiated by the judiciary . . .
>
> "The difficulty of detecting the locale of the alteration of an instrument leads to pressure upon the courts to permit a presumption in aid of

proof; but as the Supreme Court held in TOT, . . . the need for a rational relationship may not for this reason be dispensed with; the difference between the conclusion and the fact proved cannot be bridged presumptively where to do so would be arbitrary. . . "

Other cases of similar import are GARCIA v. PEOPLE, 121 Colo. 130, 213 P. 2d 387; and STATE v. GRIMMETT, 33 Idaho 203, 193 P. 381.

The instant case is to be distinguished from cases such as MORANDY v. UNITED STATES, CA 9th, 1948, 170 F.2d 5, where the circumstantial evidence of the taking was sufficient to exclude the possibility of an innocent taking. In that case, in 1946, Mrs. Bloemen owned an automobile in Lowell, Indiana. She gave permission to her husband to drive it. He drove it to Whiting, Indiana, and parked it on the street. When he returned for the car later the same day it was gone, and he had not given anyone permission to remove it and had not seen it since. The defendant was seen driving a car in Oxnard, California, which fit the description of the Indiana car, and shortly thereafter he abandoned the car on a street in Santa Maria. When the car was picked up by the California authorities, it bore a 1946 Minnesota license plate, and under the floor mat were found Iowa and Michigan license plates for that year.

In MORANDY, the circumstantial proof was complete, in that everybody who could lawfully exercise dominion over the automobile, the owner wife and her husband, testified they had

given no permission to anybody else to use the automobile. Also, the defendant's connection with the car, and alteration of the license plates, were circumstances from which his intent to hold the car as his own, and withhold it from the true owners.

It should also be noted with respect to MORANDY that the extent of the inferences, and the sequence of the inferences, which may be drawn from unexplained possession of recently stolen property in a state foreign to the theft, are defined in a far more limited manner than in the charge given to the jury in the instant case.

MORANDY considered the case of BOLLENBACH v. UNITED STATES, 326 U.S. 607, 66 S.Ct. 402, 90 L.Ed. 350, where in a case involving securities stolen in Minnesota and later disposed of by the defendant and other in New York, the Court condemned as error an instruction advising the jury that "possession of stolen property in another State than that in which it was stolen shortly after the theft raises a presumption that the possessor was the thief and transported stolen property in interstate commerce, but that such presumption is subject to explanation and must be considered with all the testimony in the case." The Ninth Circuit Court of Appeals said of this Supreme Court ruling:

> ". . . The ground of the holding is not made clear, but it seems probable that what was thought error in the charge was the use of the work 'presumption.' At any rate, until the Court clarifies its decision we shall assume that it did not intend to ban the

> inferences of fact naturally drawable from the unexplained possession of recently stolen property.
>
> "In the present instance the court was careful to instruct the jury that the burden of proving transportation was on the government, and that the possession of property stolen in another state raises no presumption that the possessor transported it in interstate commerce. "However,' the court added, 'the law is that the possession of the fruits of a crime recently after its commission, --namely, here, the automobile, in the absence of an explanation justifying the possession, warrants an inference pointing towards guilt. The inference fades as time elapses.' We think the instruction correctly stated the law."

In addition to the fact that the instruction approved in MORANDY merely called to the jury's attention the fact that unexplained possession of recently stolen property warrants an inference pointing towards guilt, and did not inform the jury as in the present case, that

> ". . . the jury would ordinarily be justified in drawing from those facts (possession of recently stolen property in another state than that which it was stolen) the inference that the motor vehicle was transported, or caused to be transported in instate commerce by the accused with knowledge that it was stolen, unless possession of the recently-stolen

unless possession of the recently-stolen property by the accused in such other state is explained to the satisfaction of the jury by other facts and circumstances in evidence in the case." (Tr. p. 110, lines 18-25).

The Court's instruction in the instant case cannot be approved on the basis that it expresses itself, euphemistically, as dealing with "inferences," when, obviously, it is specifying the facts the jury may conclude are established by the evidence; and when, obviously, it casts upon the defendant the burden of overcoming the inference with opposing evidence. In such case, the "inference" becomes a "presumption" and shifts the burden of proof to the defendant. MANN v. UNITED STATES, CA 5th, 1963, 819 F.2d 404, discussed earlier at page 43 hereof.

In addition, the Court's instructions were utterly confusing as to the permissible sequence of inferences. As earlier noted, the defendant contended that before the jury could infer that he had transported the automobile in interstate commerce, it would first have to infer and find that he stole the automobile. The court, by a mistake on its part (Tr. p. 120, lines 19-25--p. 121, lines 1-9) gave an instruction which allowed the jury to infer the defendant transported the stolen automobile in interstate commerce with knowledge it was stolen, only if it had first drawn the inference and found from all the evidence, the defendant stole the automobile. (Tr. p. 112, lines 5-13).

This instruction conflicted with the court's instruction in defining the elements of the crime that "The proof need not show who may have stolen the motor vehicle." (Tr. p. 109, lines 2-3). It also conflicted with the court's lengthy instruction given by the court beginning at Tr. p. 109, line 17, and continuing through line 4 on p. 112, dealing with the inferences to be drawn from unexplained possession of recently stolen property. The court had also advised the jury in the course of opening argument that the Government was correct in asserting it did not have to prove the defendant personally stole the car (Tr. p. 20, lines 1-25), denying defendant's motion for mistrial and refusing to allow defendant to specify the ground of objection thereto.

MORANDY states the rule as to sequential inferences as follows:

> ". . . Obviously somebody transported it /Mrs. Bloemen's Indiana automobile/ in interstate commerce. As seen, it had recently been stolen in Indiana; and appellant did not take the stand or in any way attempt to explain his possession of it in California. The courts have long thought that possession in such circumstances warrants the inference that the possessor was the thief. This judicially sanctioned inference, we may add, had its genesis in human experience, that is to say, it is not a rule conveniently concocted by judges to fill gaps in the proof. Compare TOT v. UNITED STATES, 319 U.S. 463, 63 S.Ct.

> 1241, 87 L.Ed. 1519. Since the jury were at liberty to infer that appellant stole the car, they were necessarily warranted in concluding that he transported it, knowing it to be stolen, to the place where it was found in his possession."

In the case of TRAVERS v. UNITED STATES, C.A.. D.C., 1964, 335 F.2d 698, the defendant was prosecuted for (1) unauthorized use of automobile in the District of Columbia and (2) for interstate transportation of the automobile from the District to Maryland, knowing it to have been stolen. He was acquitted of unauthorized use in the District, but convicted of interstate transportation. The defendant requested an instruction that if the defendant was acquitted on the first count, he must also be acquitted on the second count. The proof in that case was that Joseph Spell parked his 1957 Ford overnight on a District of Columbia street. The next morning, September 16, 1962, it was gone, and was not discovered until two months later when the police found defendant in Maryland behind the wheel of the car after it had collided with a tree. He was bleeding from a gunshot wound in his back. During the month the automobile was stolen, the defendant bought two junked 1957 Ford cars, one from a yard in Virginia and another in Maryland. He submitted the title of his Maryland car to the District of Columbia licensing authority and obtained a District of Columbia title and license tags on September 5, 1962. When he was found in the car, it bore the District of Columbia licen

tags appellant got for his Maryland junk purchase, and the public serial number of his Virginia junk purchase, but the confidential serial number was that of the car that was stolen.

There was no testimony that Travers stole the car from its parking place on September 16, 1962, or that he used it in the District during the next two months, or that he transported it into Maryland on or about November 16, when he was found in it.

A defense witness testified Chester Williams drove up in the car and at defendant's request agreed to take defendant and the witness to the witness' house; that an altercation arose over some girls fooling around with them in which defendant was shot and the witness and Williams left defendant in the car. A preacher and his son testified defendant was at their home in Virginia, 145 miles away from the District when the car was stolen. A police detective testified defendant told him he bought the stolen car in Virginia from Williams, and then made the Maryland junk purchase because Williams couldn't give him a title, which contradicted the proof defendant submitted the Maryland title to the District of Columbia licensing authority ten or eleven days before the Spell car was stolen.

This evidence is greatly more incriminating than any in the present case. Nevertheless, the court held that unless the jury convicted defendant of unauthorized use in the District, it could not draw the inference from unexplained possession of property recently stolen, that he had knowingly transported an automobile in interstate commerce.

The court said:

"The unexplained possession of goods lately stolen permits, but does not require, the inference that the possessor was the thief, even though there was no direct evidence of the larceny. In prosecutions solely under 18 U.S.C. §2312 (the basis of count two), where of course only the interstate transportation of a stolen motor vehicle is charged (without accusation of the initial theft which is not a federal offense), the courts permit the inference from unexplained possession in state B of a motor vehicle lately stolen in state A, that the possessor transported it from state A to state B, knowing it had been stolen.

"This permissible inference in cases under the federal statute is a corollary of the inference permitted in larceny cases from the unexplained possession of recently stolen goods. Under the decided cases, unexplained possession of a stolen motor vehicle justifies the inference that the possessor stole it. So, if the defendant is found in possession in another state, it may also be inferred that he transported the car from the state in which he stole it into the state where he was found in possession.

"Several courts of appeals have had occasion to note this relationship between the inferences: that the inference of interstate transportation

depends upon the inference of theft. The Ninth Circuit said in Morandy v. United States, 170 F.2d 5 (1948), cert. denied 336 U.S. 938, 61 S.Ct. 741, 93 L.Ed. 1097 (1949):

> ' * * * Since the jury were at liberty to infer that appellant stole the car, they were necessarily warranted in concluding that he transported it, knowing it to be stolen, to the place where it was found in his possession.'

To the same effect is Battaglia v. United States, where the Fourth Circuit said:

> ' * * * The decision /Bollenbach v. United States/ does not repudiate the rule established by a myriad of decisions that possession of recently stolen goods will support an inference that the possessor is guilty of the theft; and if this inference be tenable, it is equally reasonable to infer that the supposed thief engaged in the removal of the stolen property to the point where it was found in his possession. It seems absurd to us to say that the possession of a stolen car in the state of destination gives rise to an inference that the possessor stole the car in the state of origin, but permits no inference that he was a party to the asportation.' (Emphasis added.)

> "The Battaglia reasoning was approved and adopted in Prince v. United States, where the Sixth Circuit also indicated that the inference of unlawful interstate transportation which may be drawn from unlawful possession in the second state flows from the inference that the unlawful possessor had stolen the property in the state of origin. And in the Bray case we indicate the same thinking when we said the Bollenbach opinion 'does not bar an inference from possession of recently stolen goods that the posses has stolen and transported them.' (Emphasis added.)
>
> "We conclude, therefore, upon reason and upon ample authority as well, that the inference of interstate transportation which may be drawn from unexplained possession of a stolen automobile in a second state springs from and depends upon a prior inference from such possession that the possessor had stolen the car in the first state. And this is true even in those federal districts where the theft itself--which is not a federal offense--is of course not charged in the indictment."

In summation, under the foregoing authorities, the evidence was insufficient to establish the Egan automobile was stolen from the motor company lot. No inference could be drawn from the defendant's unexplained possession of the automobile in Nevada, unless the facts proved the car was stolen, as the inference only arises from possession of stolen

property. The defendant was entitled to judgment of acquittal at the conclusion of the Government's evidence in the first trial, and all the way on through these tortous proceedings.

But if defendant is wrong in that contention, then certainly he is entitled to the reversal of his conviction for the error in permitting the jury to infer that the defendant knowingly transported a stolen automobile in interstate commerce without first requiring the jury to find that the defendant stole the automobile in Arizona.

Defense counsel has examined dozens and dozens of cases upholding Dyre Act convictions, but in all of them, the circumstances proved regarding the elements of theft, interstate transportation, and possession by defendant are greatly more incriminating than in the present case, and often were considered sufficient to support the conviction in the absence of any inferences drawn from unexplained possession. In this case, unless the inferences from unexplained possession are relied on to support the conviction, there is no proof of guilt. The verdict and conviction are the product of stripping defendant of the presumption of innocence, casting the burden of proving a crime was not committed on him, and allowing criminal liability to be predicated on suspicions and guesses. The Government cannot rely on a presumption not supported by the facts WOLF v. UNITED STATES, CA 7th, 1929, 36 F.2d 450; and "substantial evidence means more than a synthesis of a chain of inferences from equivocal fact. UNITED STATES v. WAPNICK, 202 F.Supp. 712.

POINT TWO: AN INSTRUCTION ON PRESUMED INTENT AND A PROSECUTION REQUIRING AS ONE OF ITS ELEMENTS PROOF OF SPECIFIC CRIMINAL INTENT IS PLAINLY ERRONEOUS AND PREJUDICIAL TO THE DEFENDANT.

The instruction given by the Court on presumed intent appears at Tr. p. 106, beginning at line 10 and continuing through line 4 on page 107, and is hereinabove set forth under Specification of Errors number 6, together with the circumstances of objection to this instruction at an earlier trial and the circumstances due to which the defendant inadvertently failed to renew this objection at the Third Trial.

It cannot be disputed that specific criminal intent is an element of the crime under consideration, MORISSETTE v. UNITED STATES, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288, and the Court instructed the jury to such effect in this case. (Tr. p. 105, lines 16-21).

In the case of BLOCH v. UNITED STATES, CA 9th, 1955, 223 F.2d, 297, this Honorable Court reversed a conviction for fundamental error in the charge under Rule 52 (b) Federal Rules of Criminal Procedure, 18 U.S.C., where the Court erroneously gave instruction on presumed intent although the defendant had made no objection to the charge given. This Court approved the following language from the MORISSETTE case:

> "We think presumptive intent has no place in this case. A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense. A presumption

The authority of the Congress to enact the National Motor Theft Act is derived from its power to regulate interstate commerce, and prevent the transportation of stolen automobiles in interstate or foreign commerce, within its power to forbid and punish the use of such commerce to promote immorality, dishonesty, or the spread of any evil or harm to the people of other states from the state or origin. BROOKS v. UNITED STATES, 267 U.S. 432, 69 L.Ed. 398, 45 S.Ct. 345, 37 A.L.R. 1407. Congress has no power to punish unauthorized transportation or possession of property (even stolen property) in the forum state. DAVIDSON v. UNITED STATES, CA 8th, 1932, 61 F.2d 250.

The circumstances of this case did not prove the commission of a federal offense within the jurisdiction of the lower court.

> which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime. Such incriminating presumptions are not to be improvised by the judiciary. Even congressional power to facilitate convictions by substituting presumptions for proof is not without limit."

The Court's instruction in the present case in stating: "so unless the contrary appears from the evidence" casts the burden of proof on the defendant to establish his innocence of criminal intent, a matter which the Court said in MANN v. UNITED STATES, CA 5th, 1963, 319 F.2d, 404: "is specifically harmful when a person is required to overcome a presumption as to anything subjective, such as intent or wilfulness, and a barrier almost impossible to hurdle results." See also CHAPPELL v. UNITED STATES, CA 9th, 1959, 270 F.2d 274; UNITED STATES v. BARASH, CA 2d, 1966, 365 F2d 395.

The effect of this instruction, together with the error in the instructions raised under Specification of Errors

numbers 7, 8, and 9, permitted the jury to presume the commision by the defendant of the ultimate acts involved, and allowed them to presume criminal intent and allowed them to convict, not on the basis of proof beyond a reasonable doubt, but such standard as would apply in a civil action.

POINT THREE: THE TRIAL JUDGE INVADED THE PROVINCE OF THE JURY IN A MATERIAL MATTER TO DEFENDANT'S PREJUDICE BY ASSUMING IN ITS INSTRUCTION AS TO THE ELEMENTS OF THE CRIME THAT THE DEFENDANT TRANSPORTED THE AUTOMOBILE IN INTERSTATE COMMERCE.

The foregoing point is raised with respect to Specification of Error No. 7, wherein the Court's entire instruction as to the elements of the offense is set forth, from Tr. p. 108, beginning at line 11, continuing through line 3 of p. 109. In the body of this instruction the following appears:

> "The second element, did the defendant transport the automobile in interstate commerce.
>
> "Third, that when so transported the defendant knew that the motor vehicle had been stolen."

The Court had previously ruled it would give Defendant's Proposed Instruction No. A on the elements of the crime, which set forth in simple declarative form the three elements required to be proved. (R. p. 154). In departing from the form of said proposed instruction, and in phrasing the second

element in interrogative form, followed by the third element stated in declarative form, the harmful factual assumption on the part of the court was made known to the jury.

The correctness of the proposed instruction, and the error inhering in the charge given by the Court, are both made clear in the following holding from the case of DIXON v. UNITED STATES, CA 8th, 1961, 295 F2d 396, where such an assumption was made with respect to the issue of theft of the automobile by the defendant:

> "In Dyer Act prosecutions the Government is required to establish the existence of three essential elements. One, that the motor vehicle was stolen, that is, that possession thereof was obtained through larceny, or that there was a felonious conversion with intent to deprive the owner of the vehicle within the meaning of United States v. Turley, supra; two, that the defendant transported the automobile in interstate commerce, and three, that when so transported the defendant knew the motor vehicle had been stolen. Here, both the first and second elements were in controversy and, of course, were fact questions which the jury was required to resolve. Certainly there was substantial competent evidence from which the jury, under proper instructions, reasonably could have found against the defendant on both issues, but we are persuaded to believe that the underlying question of whether the automobile

had been feloniously converted by defendant was not submitted in clear and concise language. Indeed, the charge, insofar as it touched on this element of the offense, was so couched that, conceivably, it served to confuse rather than clarify the issue. Thus at the outset of the charge, the Court stated, 'We are not concerned here with whether or not the man stole the car. It is a question of whether or not he transported it across the state line knowing it to have been stolen.' This statement was followed with: 'It so happens in this case, of course, that if the man didn't take the car wrongfully or <u>within the meaning of the law</u>, he will not be guilty.' (Emphasis supplied.)

"We are satisfied that the portion of the charge under scrutiny cannot be sustained as constituting legitimate and proper comment on the evidence. Sullivan v. United States, 85 U.S.App.D.C. 409, 178 F.2d 723. The challenged statements not only invaded the province of the jury as to a material matter, but thereby the court prejudicially assumed, upon a finding that the automobile had been driven into Missouri, that the defendant had wrongfully and feloniously acquired possession thereof and converted the same with intent to deprive the owner of the benefits of ownership.

"Since no portion of the charge, which we have

considered as a whole, can properly be regarded as having submitted the element of felonious conversion of the automobile, it necessarily follows that the vice and ill effects of the portion under attack were not cured and rendered harmless by the remainder of the charge."

POINT FOUR: THE TRIAL COURT IN VIOLATION OF THE REQUIREMENTS OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION INSTRUCTED THE JURY WITH REGARD TO AN EVIDENTIARY PRESUMPTION WHICH WAS NOT WARRANTED BY THE PROOF.

The foregoing proposition is addressed to the matters contained in Specifications of Error Nos. 8 and 9, and also to the matter contained in the Court's charge objected to under Specification of Error No. 7, wherein the jury was instructed the proof need not show who may have stolen the motor vehicle. (Tr. p. 109, lines 2-3).

The errors in the charge are under the circumstances of this case inextricably wound about the issues raised with respect to the sufficiency of the proof to establish the corpus delicti, and the crucial fact of the stealing of the automobile. The entire matter is treated under Point One hereof, wherein the authorities clearly establish that before the circumstances unexplained possession are sufficient to give rise to any inferences pointing toward guilt, it must be established the possession is of stolen property; and that before the jury can

infer the ultimate facts, that the defendant knowingly transported a stolen motor vehicle in interstate commerce from the fact of unexplained possession, it must (in the absence of other proof thereon) first determine under all the evidence that the defendant stole the car and then it may permissibly infer that since he stole it he was the one who transported it in interstate commerce.

Reference is made to the entire argument under Point One, in support of this Point Four, with specific reference, on the matter of instructions to the cases of MORANDY v. UNITED STATES, CA 9th, 1948, 170 F.2d 5; and TRAVERS v. UNITED STATES, C.A., D.C., 1964, 335 F.2d 698, and authorities therein cited and discussed, all of which have been the subject of discussion and argument under Point One.

POINT FIVE: THE TRIAL COURT CHARGED THE JURY IT COULD AND SHOULD DETERMINE WHETHER OR NOT THE DEFENDANT'S GUILT WAS PROVED UNDER A LOWER STANDARD OF PROOF THAN PROOF BEYOND A REASONABLE DOUBT.

This point is addressed to that portion of the charge to the jury set forth as Specification of Error No. 9, which instructed it there was nothing peculiarly different in the way the jury should consider the evidence in a criminal case from that in which all reasonable persons treat any question depending upon evidence presented to them. They were expected to use their "good sense" and give the evidence a reasonable and fair construction, in the light of their common

knowledge of the natural tendencies and inclinations of human beings. The meaning of this instruction is utterly foreign to a system of jurisprudence where due process of law requires that the presumption of the defendant's innocence can only be overcome by proof beyond a reasonable doubt of the accused's commission of all of the elements of the crime with criminal intent, in the present case specific criminal intent.

The instruction is derived, verbatim, from §15.06, Mathes & Devitt, Federal Jury Practice and Instructions, p. 157, there entitled: "Judging the Evidence."

This instruction would be plainly fundamentally and prejudicially erroneous even in a case where all the rest of the charge to the jury was letter perfect. In the instant case, it was the final and conclusive deprivation of defendant's constitutional rights.

The defendant's objection to the giving of this instruction, which had also been made in substantially the same form at the preceding trial (R. p. 113, lines 21-26, p. 114, lines 1-5), was as follows:

> "MRS. QUINTANA: It applies to the proof in this case, not the standard which is required in all criminal cases, but simply the standard that applies in civil cases, that this is manifestly erroneous and is uniquely prejudicial to the defendant in this case for the reason that the proof is circumstantial, and more so than in a case of direct evidence, the jury is required to abide by the universal requirement

> that proof be established beyond a reasonable doubt and that a reasonable doubt is such a doubt as would prevent the person from proceeding in respect of the serious [affairs] of his own existence, and they are not entitled to apply the civil standard in the consideration of the evidence." (Tr. p. 120, lines 5-16).

There can be no doubt that the court's giving of this instruction was deliberate. But it has been held that even an inadvertent departure from this standard in the charge constitutes reversible error. In the case of UNITED STATES v. CRESCENT-KELVAN CO., CA 3rd, 1948, 164 F.2d 582, the trial court inadvertently stated throughout its charge that the guilt of the defendants was to be proved "by proving by preponderance of the evidence their wrongdoing." When the error was called to the court's attention, it instructed the jury the government had the burden throughout the trial of proving every fact essential to the defendants' conviction by proof beyond a reasonable doubt. Counsel requested that the court explain the meaning of reasonable doubt, and omit any further reference in its charge to preponderance of the evidence. Then the court, in response to the suggestion, charged:

> "The question of reasonable doubt is the question that you are to determine. If you are satisfied beyond a reasonable doubt that in the first count of the information that there was an adulteration, that is sufficient; if you are satisfied on the second count beyond a reasonable doubt

> that this was misbranded, that is sufficient. Does that answer your question? -- that is the preponderance of the evidence."

The court said, viewing the charge as a whole, the necessity of the jury finding the proof was sufficient to prove the defendants' guilt beyond a reasonable doubt was not clear, and ruled that the defendants in criminal cases are entitled to a clear and unequivocal charge by the court that the guilt of the defendants must be proved beyond a reasonable doubt, and reversed the conviction.

It will be noted that no authority for the giving of Instruction §15.06 is cited in Mathes & Devitt, Federal Jury Practice and Instructions. Counsel for the defendant has not been able to discover any reported criminal case in which the charge has been approved. It goes far beyond the charge responsible for the reversal of the conviction in CRESCENT-KELVAN, and is, under our Constitution, utterly, indefensibly, materially and prejudicially erroneous.

POINT SIX: THE DEFENDANT WAS DEPRIVED OF THE BENEFIT OF COUNSEL AT THE TIME OF IMPOSITION OF SENTENCE IN VIOLATION OF THE SIXTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The foregoing point is addressed to Specification of Error number 10, in which the defendant and his attorney were not afforded an opportunity to confer regarding certain matters contained in the pre-sentence report under consideration by the

Court, all set forth in the description of the sentencing procedures contained in the case herein. It will be noted that Rule 32 of the Federal Rules of Criminal Procedure clearly establishes the right of the defendant and his counsel to present to the Court information in mitigation of punishment. The Court proceeded immediately to sentence the defendant after the rendition of the guilty verdict by the jury. It allowed defendant's counsel a period of ten minutes to examine the pre-sentence report used by the Court. It did not allow the defendant to be present during that examination by his counsel. It refused the application of counsel that defendant be allowed to see a portion of the pre-sentence report as to which counsel was without any information as to the defendant's concern therewith or any contention he might wish to make in respect thereto in his behalf.

The case is comparable to PETERS v. UNITED STATES, C.A., D. C., 1962, 307 F.2d 193. See also, generally, PEOPLE v. BETILLO, N.Y. 1967, 279 N.Y.S. 2d, 444, which contains an excellent summation of the authority with regard to the right to counsel at imposition of sentence. Of course, the right to counsel means the right to effective counsel, and is not satisfied by the mere presence of a designated attorney for the defendant, who is not allowed to confer with the defendant regarding the information charged against him in a pre-sentence report, and who, therefore, cannot serve as the defendant's agent and advocate with regard to such matter.

CONCLUSION

The defendant is entitled to the reversal of the conviction appealed from and the entry of Judgment of Acquittal. The proof is not sufficient to establish the commission of a federal crime or the defendant's guilt thereof. The errors in the instructions, the perplexity of the second jury, and the inability of the first jury to agree, all manifest the impossibility of having a fair and speedy trial under constitutional safeguards pertaining to the criminally accused, where the evidence relied upon by the Government is not sufficient to sustain a conviction; but, if the Court deems otherwise, the numerous reversible errors of law committed in the proceedings in the lower court should not result in a remand of the case for a new trial. As was held in the case of PURVIS v. STATE OF CALIFORNIA, 1964, 234 F.Supp. 147, there is a constitutional limit to the number of times a man must undergo trial. This limit flows from the prohibition in the Eighth Amendment to the constitution of the United States against cruel and unusual punishment.

Respectfully submitted by:

Annette R. Quintana
ANNETTE R. QUINTANA
108 South Third Street
Las Vegas, Nevada
ATTORNEY FOR APPELLANT

CERTIFICATE OF COMPLIANCE

I hereby certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and, in my opinion, the foregoing brief is in full compliance with those rules.

Annette R. Quintana
ANNETTE R. QUINTANA
108 South Third Street
Las Vegas, Nevada
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of September, 1967, I delivered three copies of the foregoing Brief to opposing counsel at Las Vegas, Nevada.

Annette R. Quintana
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January 30, 1967

Y TO: Las Vegas Office

Re: SPRADLIN, Howard Dwayne
Docket No. 1434

. Annette R. Quintana
orney at Law
So. 3rd Street
Vegas, Nevada

r Mrs. Quintana:

ase be advised that the confidential Presentence Report
ative to the above-named defendant has been completed and
l be available to you in the Probation Office, Suite 18,
S. 7th Street, at your convenience, from the date of this
ter until 4:30 P.M. on February 10, 1967.

offices are closed from noon to 1:00 P.M., Monday through
day.

Very truly yours,

HUBERT A. BOYD
Chief U.S. Probation Officer
By

Eugene Sadoian
EUGENE SADOIAN
U.S. Probation Officer

jf

Appendix "A"

AFFIDAVIT OF COUNSEL

STATE OF NEVADA)
) SS.
COUNTY OF CLARK)

ANNETTE R. QUINTANA, being first duly sworn, upon her oath deposes and says:

1. That she is court-appointed counsel for the defendant (appellant) herein, and as to any matter contained in the foregoing brief which is not established by the record, the same is true and correct of her own knowledge.

2. That with respect to that portion of the foregoing brief in the Statement of the Case, wherein the procedures at the sentencing of the defendant are described, that each and every statement therein contained is true of her own knowledge, and further, that:

A. Appendix "B" attached hereto is a true and correct copy of a letter sent to the affiant by mail.

B. Affiant is associated in the practice of law with Harry E. Claiborne, Esquire, 108 South Third Street, Las Vegas, Nevada, and is responsible during periods of time when he is absent from his office, for the discharge of such matters in the protection and prosecution of litigation pending in his office as he may direct.

C. That Mr. Claiborne was necessarily absent from his office from January 30, 1967 until February 10, 1967,

defending the criminal prosecution of Kenneth Ronald Graves by the State of Nevada at Reno, Washoe County Nevada, in Case No. 218973, on a charge of Attempt to Commit Murder in the First Degree

D. During the period of Mr. Claiborne's absence as aforesaid, in addition to numerous matters of regular office procedure which required affiant's attention, she necessarily performed the following:

(1) Prepared for trial and represented the plaintiffs in a civil jury trial for personal injuries resulting to the minor plaintiff from an explosion of chemicals, in the case of Louis Sturchio, as the Natural Father of Ronald L. Sturchio, a minor, vs. W. L. Holst, dba Walgreen's College Park Drug Store, defendant, which trial commenced in the Eighth Judicial District Court, Clark County, Nevada on February 1, 1967, and continued through all of the following day;

(2) Appeared for contested motions in divorce actions on Thursday, February 2, 1967, in the case of Azbill vs.

Azbill; and on Friday, February 3, 1967, in the case of Kuehl vs. Kuehl; both before the Eighth Judicial District Court in Clark County, Nevada.

(3) Appeared for the defendant Danny Kehl on February 6, 1967, at the procedure for imposition of sentence in a prosecution by the State of Nevada on a charge of manslaughter.

(4) Prepared for trial and represented the plaintiffs in the case of Angus Blad and Marie Blad vs. Bjornson tried to the Eighth Judicial District Court in Clark County, Nevada, to set aside a deed conveying real estate, which trial was had February 7, 1967.

(5) Was called to come to Reno, Nevada, by plane, the evening of February 7, 1967, for conferences and investigation scheduled that night and the following day in litigation pending against Robert W. Chiatovich, et al. by Old West Enterprises a Nevada corporation, and Texierra Mining Corporation, a

Texas corporation, in Washoe County, Nevada.

(6) Returned to Las Vegas by plane the evening of February 8, 1967, and spent Thursday, February 9, 1967, in consultation with co-counsel and the said Chiatovich and other defendants, preparing for show cause order to be held in Reno, Washoe County, Nevada, on Friday, February 10, 1967, before the Hon. Judge Gabrielli, in the Second Judicial District Court of the State of Nevada, and appeared at said proceedings in Reno, Nevada representing defendants at a full days' hearing.

E. That before going to the airport in Las Vegas for the flight to Reno on the morning of February 10, 1967, affiant went to the office of the Clerk of the United States District Court in Las Vegas, Nevada, and (not having the letter of notification, Appendix "A", with her) inquired as to the location of the office of the United States Probation Officer, and was informed it was located several blocks away. Being unfamiliar with the location, affiant concluded there was not sufficient time to locate the office, then

examine the report, and still keep her commitment to be on the flight to Reno.

F. On February 13, 1967, the date originally set for sentencing after the Second Trial of defendant Spradlin, the case was continued for sentencing to February 27, 1967 (R. p. 3, docket entry for 2-13-67). Defendant had theretofore filed a Motion for Acquittal, and a Motion for New Trial which were scheduled for hearing and heard on February 20, 1967, and the motions taken under submission (R. p. 140).

G. On February 22, 1967, affiant not having then been notified the trial court had granted defendant's motion for a new trial by order made in chambers in the absence of counsel on February 20, 1967, and still believing the case stood on the calendar for sentencing on February 27, 1967, affiant went to the United States Probation Office on February 22, 1967, to examine the pre-sentence report, but was informed by another occupant of the building the office was closed in observance of Washington's Birthday, which holiday was not being observed by the courts of the State of Nevada.

H. Affiant was necessarily in Reno, Nevada on Thursday and Friday, February 24th and 25th, 1967, for further court proceedings and matters in connection with the litigation described in paragraphs D (5) and D (6) hereof, and it was not

until Monday, February 27, 1967, upon her return to her office, that Affiant received notice of the order for new trial (R. 142).

I. Affiant considered in good faith that if the defendant should stand convicted after the Third Trial that she would be afforded ample opportunity to examine the pre-sentence report.

Annette R. Quintana
ANNETTE R. QUINTANA

SUBSCRIBED AND SWORN to before me
this 7th day of Sept., 1967.

Ruby Kent
NOTARY PUBLIC

RUBY KENT
NOTARY PUBLIC
State of Nevada, Clark County
My commission expires January 24, 1969